

DATE: May 29, 1998

CASE NUMBER 97-CAA-12

In the Matter of

ERIC MUNZ, LINDA CLARK  
and MARK DUNCAN,

COMPLAINANTS,

v.

SACRAMENTO METROPOLITAN AIR QUALITY  
MANAGEMENT DISTRICT,

RESPONDENT.

RECOMMENDED DECISION AND ORDER DISMISSING COMPLAINT

The above-captioned matter involves a complaint filed with the Secretary of Labor on April 5, 1997 under section 322 of the Clean Air Act, 42 U.S.C. §7622, by the three above-captioned Complainants. A trial on the merits of the complaint commenced on November 3, 1997 and was recessed on November 7, 1997 after the receipt of five days of testimony. Thereafter, the trial was scheduled to resume in Sacramento, California, at 9:00 a.m. on February 17, 1998.

At approximately 7:00 a.m. on the morning of February 17, 1998 Complainant Clark faxed a 19-page letter and 21 pages of various other documents to the San Francisco office of the undersigned administrative law judge. In the letter, Complainant Clark asserted that John Simonson, the attorney who was then representing all three of the Complainants, had been "deliberately negligent" in his representation of her interests, that her case was being "sabotaged" so that the other two Complainants could get a "larger payoff," and that she has been "screwed over" by Mr. Simonson "in collaboration with" the Respondent and its attorneys. In addition, Complainant Clark also indicated that, because her mother would be able to stay at her house to "literally guard it against further break-in and theft" of files related to this case, she would attend the trial on February 17 but did not intend to attend on subsequent days because she felt her time could "be more productively spent packing; looking for an honest, competent, available and affordable labor attorney (know any?); and continuing to look for another place to live for myself and my cats." In the letter, Complainant Clark also represented that Complainant Duncan had indicated to her during a conversation on October 10, 1997 that he felt that he could successfully lie under oath when called to testify in this proceeding.

When the trial resumed in Sacramento at 9:00 a.m. on February 17, Complainant Clark was present but did not provide anyone with copies of the foregoing faxes.<sup>1</sup> As a result, no one other than Complainant Clark knew the full contents of these documents. However, since it was known by the undersigned that a lengthy document had been faxed to San Francisco, Complainant Clark was directed to make copies available to Mr. Simonson, the undersigned, and the other parties. That evening Complainant Clark faxed a copy of the letter and other documents to Mr. Simonson, who provided copies to the undersigned and to the other parties during the course of the trial on the following day, February 18. A copy of these materials has been marked and admitted into evidence as Administrative Law Judge Exhibit (ALJX) 1.<sup>2</sup> After review of these materials, it was determined by the undersigned that they raised a variety of issues that could be properly resolved only by questioning Complainant Clark on the record. Thus, since Complainant Clark had not appeared when the trial resumed on February 18, Mr. Simonson was directed to inform Complainant Clark that she had been ordered by the undersigned to appear for such questioning on the following day. On the evening of February 18, Mr. Simonson went to Complainant Clark's home and informed her that she had been ordered to appear at 9:00 a.m. on February 19 and that failure to appear could result in dismissal of her complaint. Complainant Clark gave Mr. Simonson a hand-written statement confirming her receipt of such notice. That statement has been marked and admitted into evidence as ALJX 2. In the statement, Complainant Clark specifically acknowledged that she had been informed that her complaint could be dismissed if she failed to appear as ordered.

At 8:13 p.m. on February 18, Complainant Clark faxed a second letter to the San Francisco office of the Office of Administrative Law Judges. In the letter, which has been admitted into evidence as ALJX 3, she represented that she had the flu and might not be able to appear the following day. She further represented that she would "make every effort (with the help of Pepto-Bismol)" to appear on Friday, February 20. When the trial resumed at 9:00 a.m. on February 19, Complainant Clark again failed to appear. Tr. at 2065-2120. Those present were advised of Complainant Clark's second fax and informed that, in view of Complainant Clark's prior conduct, the undersigned was highly skeptical of the representations in the fax. Tr. at 2067-68, 2109. Although counsel for the Respondent thereupon requested that the remainder of the trial be postponed until the parties could more fully explore the issues raised by Complainant Clark's February 17 fax, an additional session was reluctantly scheduled for the next day based on Mr. Simonson's opposition to the Respondent's request and on Mr. Simonson's representation that Complainant Clark had "assured" him that she would appear on February 20. Tr. at 2104-06 (motion for postponement), Tr. at 2108 (representation that Complainant Clark had assured Mr. Simonson she would appear on February 20). Mr. Simonson was explicitly directed to again contact Complainant Clark and to inform her that if she failed to appear the following day, her complaint could be dismissed. Tr. at 2114-15, 2118. As

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<sup>1</sup> During early February, Complainant Munz and the Respondent entered into a proposed settlement agreement and, therefore, when the trial resumed on February 17, only the complaints of Complainants Duncan and Clark were still in issue.

<sup>2</sup> The materials provided by Mr. Simonson are identical to the documents faxed to San Francisco except for the cover sheets and the markings showing when the materials had been faxed.

well, the receipt of any further trial testimony was deferred until such time as the propriety of Mr. Simonson's continued representation of Complainant Clark could be determined. Tr. at 2119.

At 9:00 a.m. on February 20, the trial was again resumed. Although Mr. Simonson reported that his efforts to contact Complainant Clark had been unsuccessful, Complainant Duncan represented that he had spoken to Complainant Clark on the evening of February 19 and informed her that she been ordered to appear the following morning. Tr. at 2126-27. Nonetheless, Complainant Clark again failed to appear. After extended debate, it was determined that Complainant Clark should be given approximately 30 days notice of a hearing in which she would be required to show cause why her complaint should not be dismissed on the grounds that she had repeatedly failed to appear. Tr. at 2137-39, 2155. Because of the continuing uncertainty concerning Mr. Simonson's authority to represent Complainant Clark, no evidence on the merits of either the Clark or Duncan complaints was received during the February 20 trial session.

On February 25, an Order to Show Cause was issued directing Complainant Clark to appear at 9:00 a.m. on March 25, 1998 and to show cause why her complaint in this proceeding should not be dismissed pursuant to the provisions of 29 C.F.R. §24.5(e)(4)(i)(A) and (B) for failing without just cause to appear as ordered on February 19 and 20.<sup>3</sup> In addition, the Order notified Complainant Clark and the other parties that, as a prelude to consideration of foregoing issue, Complainant Clark and the other concerned parties would be required to address the following preliminary issues: (1) the authority and obligation of Mr. Simonson to continue representing Complainant Clark, and (2) the existence of possible conflicts of interest in Mr. Simonson's continued representation of both Complainant Clark and Complainant Duncan. In describing the nature of the first issue, it was specifically noted that although Complainant Clark's fax of February 17 had expressed great dissatisfaction with Mr. Simonson's representation and requested advice on obtaining another attorney, the fax did not unequivocally terminate Mr. Simonson's authority to represent Complainant Clark, indicate an intention by Complainant Clark to represent herself, or request time in which to obtain the representation of another attorney. It was also noted that Mr. Simonson had indicated during a telephone conference held on February 24, 1998 that he intended to make a motion on March 25 for leave to withdraw as counsel for Complainant Clark. Accordingly, Complainant Clark was specifically informed that if she had already decided that she no longer wished to be represented by Mr. Simonson, she should "immediately" begin searching for other legal representation (emphasis in original). She was also cautioned that "[f]ailure to do so could result in a denial of any future request for any type of postponement, including a postponement in the receipt of evidence concerning the merits of her complaint."

Finally, the Order to Show Cause specifically notified Complainant Clark that immediately upon completion of the Show Cause hearing and resolution of the legal representation issues set forth above, the trial on the merits of the complaints of Complainants Duncan and Clark would resume and

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<sup>3</sup>Effective on March 11, 1998, this provision was recodified at 29 C.F.R. §24.6(e)(4)(i)(A) and (B). See 63 Fed. Reg. 6614 et seq. (Feb. 9, 1998).

continue until all remaining evidence had been offered. It was also noted in this regard that, during a February 24 telephone conference, counsel for the Respondent had requested that Complainant Clark be required to appear as a witness in the Respondent's case in chief. It was further noted that the undersigned administrative law judge also intended to question Complainant Clark concerning certain aspects of her complaint that were not fully explored during her prior testimony and on the statements allegedly made to her by Complainant Duncan in October of 1997. Hence, Complainant Clark was expressly notified that she would "be expected to remain at the trial until such time as she may be released as a witness by the Respondent and the undersigned."

This Order to Show Cause was served on Complainant Clark by fax as well as by regular and certified mail. Although the copy sent by certified mail was returned by the Post Office as unclaimed, the faxed copy was received and the copy sent by regular mail was not returned.

On February 26, 1998 Mr. Simonson filed and served all parties, including Complainant Clark, with a written notice announcing his intent to make an oral motion at the March 25 hearing seeking leave to withdraw as Complainant Clark's attorney in this matter. As grounds for such motion, Mr. Simonson represented that there were "irreconcilable differences" between himself and Complainant Clark.

While the undersigned was en route to Sacramento for the show cause hearing on the morning of March 25, 1998, Complainant Clark faxed another letter to the San Francisco office of the Office of Administrative Law Judges. In the letter, she requested that Mr. Simonson's representation of her be "terminated immediately" due to his alleged "inadequate and/or negligent representation." She also represented, without elaboration, that she had been seeking other counsel and requested "one or two months" to complete the process. She further requested that her attendance at the trial be postponed until her retention of another attorney.<sup>4</sup> When the arrival of this document became known to the undersigned at approximately 8:00 a.m., a reply letter was dictated from a pay phone in Sacramento. Although this reply did not explicitly address Complainant Clark's request for additional time in which to retain a new attorney, it did explicitly state that her request to be excused from appearing in person at the 9:00 a.m. hearing was denied and that if she did not appear by 10:00 a.m. her complaint would be dismissed.<sup>5</sup> During the following two hours, repeated attempts were made to fax this reply to Complainant Clark, but none of the attempts was successful. At about 9:00 a.m. an attempt was made to reach Complainant Clark by telephone, but she did not answer.<sup>6</sup> A message was left on her answering machine asking her to return the call, but the call was never returned.

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<sup>4</sup> This document is hereby admitted into evidence as ALJX 5.

<sup>5</sup>This document is hereby admitted into evidence as ALJX 6. Due to a clerical error the letter is dated March 26, instead of the date it was actually prepared: March 25.

<sup>6</sup>A memorandum memorializing this attempt to call Complainant Clark is hereby admitted into evidence as ALJX 7.

When the show cause hearing commenced in Sacramento at 9:00 a.m., Complainant Clark was absent and her absence continued as additional testimony was received on that day and next concerning the merits of Complainant Duncan's complaint.<sup>7</sup>

At the outset of the March 25 hearing, Mr. Simonson's previously-noticed motion for leave to withdraw as counsel for Complainant Clark due to irreconcilable differences was granted. Tr. at 2168. There were two reasons for granting the motion. First, Complainant Clark's 7:43 a.m. fax had made it clear that she no longer wished to be represented by Mr. Simonson. Second, Complainant Clark's erratic behavior and lack of cooperation with Mr. Simonson made it impossible for Mr. Simonson to continue to represent her in an effective manner. The decision to grant the motion, however, was not in any way based on a belief that there was any merit to Complainant Clark's allegations that Mr. Simonson had represented her in a negligent or improper manner.

After Mr. Simonson was granted leave to withdraw as counsel for Complainant Clark, those present were informed that it was highly likely that Complainant Clark's request for a continuance would be denied and that her complaint would be dismissed. The purpose of this Recommended Decision and Order is to set forth the reasons for denying Complainant Clark's continuance request and to recommend that her complaint be dismissed with prejudice.

#### A. Continuance Request

It is well established that rulings on requests for continuances are “traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process even if the party [denied a continuance] fails to offer evidence or is compelled to defend without counsel.” Ungar v. Sarafite, 376 U.S. 575, 589 (1964). Although there are apparently no recent Federal appellate decisions setting forth factors to be considered when a party to a civil case requests a continuance for the purpose of seeking new counsel, there are decisions setting forth the factors to be weighed when such requests are made in a criminal case. Most notably, in United States v. Studley, 783 F.2d 934 (9th Cir. 1986), the Ninth Circuit held as follows:

Generally, a decision to grant or deny a continuance is reviewed for an abuse of discretion. United States v. Flynt, 756 F.2d 1352, 1358, modified on other grounds, 764 F.2d 675 (9th Cir. 1985). When the defendant's sixth amendment right to counsel is implicated, however, a court must balance several factors to determine if the denial was “fair and reasonable.” United States v. Leavitt, 608 F.2d 1290, 1293 (9th Cir. 1979) (per curiam). Among the factors are: [1] whether the continuance would inconvenience witnesses, the court, counsel, or the parties; [2] whether other continuances have been granted; [3]

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<sup>7</sup>Although there was a last minute change in the conference room in which the trial was being held, a notice of this change was prominently posted on the door of the originally scheduled conference room.

whether legitimate reasons exist for the delay; [4] whether the delay is the defendant's fault; and [5] whether a denial would prejudice the defendant. Id. Thus, a continuance may be denied "even when that denial results in the defendant's being unrepresented at trial." Id.

Id. at 938. See also United States v. Robinson, 967 F.2d 287, 291 (9th Cir. 1992) (applying the Studley factors).

Although it is arguable that fewer factors need to be considered when evaluating a continuance request by a plaintiff who is seeking to change counsel in a civil case than when evaluating a similar continuance request by a defendant in a criminal proceeding,<sup>8</sup> an abundance of caution and the absence of any more specific factors for evaluating continuance requests in civil cases suggest that the factors articulated in the Studley decision should also be considered in evaluating Complainant Clark's continuance request. Accordingly, an analysis of those factors is set forth below.

#### 1. Inconvenience to Witnesses, Court, Counsel and Parties

Apparently, no witnesses would have been inconvenienced if the continuance requested by Complainant Clark were granted. Similarly, since the attorneys representing the Respondent reside in the Sacramento area, the only inconvenience to them from granting a continuance would have stemmed from having to prepare for a third time to examine Complainant Clark. However, if the continuance had been granted, it would have been necessary at some future time for Mr. Simonson to again travel to Sacramento from his home in the Los Angeles area and for the undersigned administrative law judge to again travel from San Francisco to Sacramento.<sup>9</sup> As well, it would have again been necessary for the court reporter to travel to Sacramento from his home in Tucson.<sup>10</sup>

#### 2. Whether Other Continuances Have Been Granted

No prior continuances have been voluntarily granted to Complainant Clark by the undersigned

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<sup>8</sup> See Anderson v. Sheppard, 856 F.2d 741, 747-48 (6th Cir. 1988)(noting that although there are similarities, the right to counsel in civil cases is a different and lesser right than the right to counsel conferred on defendants in criminal cases).

<sup>9</sup>It is noted in this regard that even though Mr. Simonson has been granted leave to withdraw as counsel for Complainant Clark, he would still need to attend any further testimony by Complainant Clark in order to be present while she is being questioned concerning her allegation that Complainant Duncan was contemplating lying under oath in this proceeding.

<sup>10</sup>Although there are surely many competent court reporters who reside in Sacramento, the court reporting service having the contract to report Department of Labor trials in the western United States decided to assign a Tucson area reporter to this case, possibly because of contractual restrictions on subcontracting.

administrative law judge. However, it is important to recognize that Complainant Clark has in effect granted herself continuances on three separate occasions prior to March 25.

The first of these self-granted continuances occurred on November 4, 1997, when Complainant Clark failed to appear at the time set for her direct examination by Mr. Simonson. Tr. at 483-90. Because no alternative witnesses were readily available, the trial was suspended for about an hour and eventually another witness was called out of order. According to a note Complainant Clark provided to her attorney, her failure to appear was attributable to her attempt to seek treatment for an injured finger. Tr. at 483. As noted on the record at that time, observation of the finger earlier in the day indicated that the injury consisted of a bruise about half the size of a dime. Tr. at 488, 490. Because the injury was not considered severe enough to warrant Complainant Clark's absence, her counsel was directed to inform her that if she did not appear the following morning, her complaint would be dismissed with prejudice. Tr. at 489. When Complainant Clark did appear and testify, she apologized for her absence and represented that "it won't happen again." Tr. at 808.

Complainant Clark's second self-granted continuance occurred on February 19, 1998. As previously explained, on the previous evening she had been informed by her attorney that she had been ordered to appear the next day to answer questions concerning the contents of her February 17 fax and, after receiving that information, had even signed a written statement indicating that she had also been expressly informed that "the judge may sanction my failure to appear with a dismissal of my action." ALJX 2. Although, after receiving this notice, Complainant Clark did send the undersigned a fax in which she represented that she might not be able to appear on February 19 due to the flu, there are strong reasons for doubting the veracity of this representation. As noted in the Order to Show Cause, these reasons include the following: (1) the fact that Complainant Clark attributed her failure to appear on November 4, 1997 to a finger injury that was so minor that it was extremely hard to believe the injury was the actual cause of her absence, (2) the fact that Complainant Clark failed to appear at an arbitration hearing in a related claim against the Respondent and instead sent a fax to the arbitrator "late in the evening" before the scheduled hearing requesting that the hearing be postponed indefinitely for a series of reasons that were all found to be inadequate by the arbitrator, including a request for recusal that the arbitrator described as "a pretext for trying to delay the hearing," (3) the fact that the arbitrator also determined that the Respondent's decision to terminate Complainant Clark's employment was justified in part by evidence showing that Complainant Clark had an "atrocious attendance record" and was "totally undependable," and (4) the fact that Complainant Clark made it clear in her fax of February 17 that, for reasons unrelated to any alleged illness, she did not wish to attend any of the trial proceedings after February 17. See also Tr. at 1281-1335 (testimony of Aleta Kennard concerning Complainant Clark's frequent failures to appear at work, including absences that Complainant Clark attributed to various sudden illnesses).

The third of Complainant Clark's self-granted continuances was on February 20, 1998. As previously explained, the February 20 session was scheduled on the basis of Mr. Simonson's representation that Complainant Clark had "assured" him that she would appear on February 20.

### 3. Whether Legitimate Reasons Exist for the Delay

The basis for Complainant Clark's March 25 continuance request is an alleged need for more time in which to obtain a new attorney to represent her in this proceeding. If Complainant Clark had demonstrated that she had been inadequately represented by Mr. Simonson and if she had shown that she had promptly made good faith efforts to find a substitute counsel once determining that she had been inadequately represented, she would have legitimate reasons for requesting a continuance. However, neither of these prerequisites has been satisfied. For example, even a cursory review of the record shows that Complainant Clark was adequately represented by Mr. Simonson. Indeed, Mr. Simonson's representation of Complainant Clark was especially vigorous and inventive. Likewise, although Complainant Clark's February 17 fax indicated that she had become greatly dissatisfied with Mr. Simonson's representation as early as November of 1997, she has not provided any specific information that would even suggest that she promptly made an effort to find a new attorney. In this regard it is noted that although Complainant Clark's March 25 fax does contain an assertion that she had been trying to find another attorney, the assertion is unsupported by any details and it is thus impossible to even guess what efforts, if any, Complainant Clark actually made or when such efforts were undertaken. Given the dubious nature of her prior representations in this and related proceedings, if she had appeared as ordered on March 25, she would have been questioned in detail about these alleged efforts.<sup>11</sup> In short, in the absence of sworn answers to such questions, there is an inadequate basis for concluding that Complainant Clark did in fact make a prompt, good faith effort to find another attorney.

#### 4. Whether the Delay is the Complainant's Fault

Presumably Complainant Clark would argue that the circumstances surrounding her request for a continuance are not her fault and are instead the result of Mr. Simonson's allegedly inadequate representation. Any such argument is completely unconvincing. As previously noted, Mr. Simonson provided her with vigorous representation. Although it is true that Mr. Simonson ultimately did decide to withdraw as counsel for Complainant Clark, it is clear that this withdrawal was in fact compelled by Complainant Clark's complete failure to provide even minimal cooperation in his efforts to represent her. Indeed, Complainant Clark represented in her February 17 fax that she was refusing to communicate with Mr. Simonson over the telephone and had stopped payment on a \$1,000 check that she had given to him to cover the costs associated with this litigation. ALJX 1 at 4, 17. In addition, on November 6, 1997 she filched a note containing a privileged communication between Mr. Simonson and one of the other Complainants and later attached a copy of the note to her February 17 fax. ALJX 1 at 3.

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<sup>11</sup>It is noted in this regard that in November of 1997 Complainant Clark asserted that she needed more time to find an attorney when seeking a last minute postponement of a related arbitration proceeding. In denying this request, the arbitrator noted that Complainant Clark had not come forward with any evidence to demonstrate that she had made a diligent effort to find a new attorney during the three and one-half month period between the withdrawal of her prior attorney and the scheduled date of the arbitration proceeding. RX 15 at 2.



## 5. Whether the Denial Would Prejudice the Complainant

Ordinarily, a refusal to allow a party an opportunity to attempt to obtain counsel would in some way put the party at a disadvantage. However, in this case it is highly unlikely that Complainant Clark would be prejudiced or otherwise unfairly disadvantaged by such a refusal. There are two reasons for this conclusion.

First, by the time of Mr. Simonson's February 17, 1998 announcement that the Complainants were resting their case, it had become clear that Complainant Clark's case was so weak that her complaint was almost certain to be denied even if the Respondent were to waive its right to present a defense. Briefly summarized, the overwhelming weight of the evidence indicated that Complainant Clark's work attendance record and job performance were so egregiously deficient that her termination would have been fully justified on those grounds alone, even if the evidence were to show that her whistleblowing activities were an additional motivating factor in her termination.<sup>12</sup> See Tr. at 1202-1356 (testimony of Aleta Kennard), RX 1 (personnel file of Complainant Clark), RX 19A and 19B (supervisor's working file regarding Complainant Clark).

Second, it is extremely doubtful that Complainant Clark would be able to find a competent attorney to represent her even if she were given unlimited time in which to search for a new counsel. Although some attorneys might be willing to consider accepting her case if she were to pay a substantial fee in advance, this method of securing new representation seems to be precluded by Complainant Clark's self-reported destitution. Conversely, the possibility that a potential attorney would accept her case on a contingency fee basis is also unlikely, because, as already noted, her case in chief has already been presented and is extremely weak. Most importantly, even limited knowledge of Complainant Clark's fantastic and unsubstantiated allegations against Mr. Simonson would almost certainly deter even the most minimally prudent attorney from accepting Complainant Clark as a client. It is thus not surprising that during the two months since Complainant Clark made her March 25 continuance request, no new attorney has attempted to enter an appearance on her behalf.

In sum, all five of the relevant factors indicate that Complainant Clark's continuance request should be denied. Such a conclusion is also consistent with numerous holdings in comparable cases.<sup>13</sup>

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<sup>12</sup>In this regard, it noted that Complainant Clark's supervisor credibly testified that she had decided to recommend termination of Complainant Clark's employment even before learning of her whistleblowing activities. Tr. at 1347.

<sup>13</sup> See United States v. Studley, 783 F.2d 934 (9th Cir. 1986) (approving denial of continuance where the trial had already been continued several times and the defendant "would not have obtained counsel even had the continuance been granted"); United States v. Leavitt, 608 F.2d 1290, 1293-94 (9th Cir. 1979) (approving denial of continuance where there were scheduling difficulties, one prior continuance, and a failure to provide adequate justification for not retaining counsel earlier); United States v. Hull, 792 F.2d 941, 943 (9th Cir. 1986) (approving denial of

## B. Dismissal of the Complaint

As previously indicated, the February 25, 1998 Order to Show Cause specifically directed Complainant Clark to appear on March 25, 1998 and show cause why her complaint should not be dismissed pursuant to the provisions of 29 C.F.R. §24.5(e)(4)(i)(A) and (B) for failing without just cause to appear as ordered on February 19 and 20. She did not make a timely request to continue the March 25 hearing and her untimely,<sup>14</sup> last minute request for such a continuance has been found to be without merit. Hence, her failure to appear on March 25 as ordered was unexcused. Moreover, this failure to appear was particularly egregious because it was the fourth of series of unexcused absences and because Complainant Clark even failed to return a telephone message in an apparent effort to avoid being informed that her request had been denied. In addition, Complainant Clark's March 25 failure to appear occurred despite repeated warnings that continued failures to appear could lead to dismissal of her complaint. Indeed, Complainant Clark's history of disregarding such warnings is so bad that even if her complaint were not to be dismissed at this time, there would be no assurance that there would not be a fifth, sixth or seventh self-granted continuance. In short, failure to dismiss her complaint would unjustifiably risk further waste of Department of Labor resources, mock the procedural requirements that are a necessary element of any adjudicatory system, and be contrary to precedent. See Malpass v. General Electric Co., Case No. 85-ERA-38, Final Decision and Order, March 1, 1994; Pyramid Energy, Ltd. v. Heyl & Patterson, Inc., 869 F.2d 1058, 1062 (7th Cir. 1989) (holding a trial judge “is entitled to say under proper circumstances, that enough is enough ... and less severe sanctions than dismissal need not be imposed where the record of dilatory conduct is clear”).

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continuance where only one day before trial the defendant sought to replace an attorney the trial court characterized as “very fine”); United States v. Cole, 988 F.2d 681, 683-84 (7th Cir. 1993) (holding that where existing counsel was “making adequate progress toward trial,” the trial court was “not required to allow a last minute change in counsel to disrupt its schedule.”); United States v. Lustig, 555 F.2d 737, 744 (9th Cir. 1977) (holding that it was not an abuse of discretion to deny a defendant a continuance to obtain a new attorney when the continuance request was not made until four days before trial and the defendant had been told by the trial judge over a month before the trial date to either “make arrangements” with his existing attorney or obtain a new counsel); United States v. Kelm, 827 F.2d 1319, 1322 (9th Cir. 1987) (approving denial of continuance where record demonstrated that the defendant was “manipulating his constitutional right to counsel in an effort to effect delay,” and holding that “[w]here a defendant’s conduct is ‘dilatory and hinders the efficient administration of justice,’ a court may deny continuance even if it results in the defendant’s being unrepresented at trial”). See also Ungar v. Sarafite, 376 U.S. 575, 589 (1964); Grunewald v. Missouri Pacific Railroad Co., 331 F.2 983 (8th Cir. 1964).

<sup>14</sup>In this regard, it is noted that the provisions of 20 C.F.R. §18.28(b) require that requests for continuances be filed at least 14 days prior to a scheduled hearing date except when good cause for a continuance does not first arise until after the 14 day deadline has already passed.

## ORDER

The complaint of Complainant Linda Clark is hereby dismissed with prejudice.

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Paul A. Mapes  
Administrative Law Judge

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary of Labor unless, pursuant to 29 C.F.R. §24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, N.W., Washington, D.C. 20210. Such petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. *See* 29 C.F.R. §§ 24.8 and 24.9, as amended by 63 Fed. Reg. 6614 (1998).